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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

No. [redacted]98

October Term, 1953.

R. D. NESEN,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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NATIONAL LABOR RELATIONS BOARD,

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

R. D. Nesen, Petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on February 26, 1954.

Opinion Below.

The opinion, of the Court of Appeals [R. 85], is reported in 211 F. 2d 559.

Jurisdiction.

The judgment of the Court of Appeals was entered on February 26, 1954 [R. 94]. A motion for leave to file a petition for rehearing filed on March 5, 1954 [R. 96], was denied on the same date [R. 99]. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

Question Presented.

Whether an employer can be required to sign a collective bargaining agreement which contains major provisions to which the employer has never agreed.

Statute Involved.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151 *et seq.*) are set forth in the Appendix, *infra,* pages 1 to 2.

Statement.

On January 23, 1952, the Court of Appeals entered a consent decree requiring the Petitioner upon request to bargain collectively with the International Association of Machinists, Local Lodge No. 1831, hereinafter referred to as the "Union" [R. 1]. On August 21, 1953, the National Labor Relations Board, hereinafter referred to as the "Board", petitioned the Court of Appeals to adjudge the Petitioner in civil contempt for having failed and refused to obey this decree [R. 4]. On August 27, 1953, the Court of Appeals issued its order requiring Petitioner to show cause why he should not be adjudged in civil

contempt. Thereafter, Petitioner duly filed his answer [R. 46] in which he denied most of the material allegation in the Board's petition and set forth as an affirmative defense the fact that the Union had refused to bargain in good faith with the Petitioner. The Court of Appeals referred the cause to a Special Master for the purpose of adducing evidence and making recommended findings of fact [R. 67]. After several days of hearings the Special Master made his recommended findings of fact [R. 69] which were adopted with one slight modification, which is not germane here, by the Court of Appeals [R. 90].

The Court of Appeals found that after negotiations between Petitioner and the Union, Thomas B. Flynn, Petitioner's bargaining representative, sent to the Union a proposed written contract. On August 15, 1952,

> "the Union sent to Flynn five copies of a proposed contract. This proposed contract differed from the proposal made by the Petitioner in the foliowing respects: (1) it contained an effective date of August 15, 1952 where the Flynn document was blank; (2) it provided dates during which union members might resign in the future as from August 1 to August 15 of each succeeding year, where the Flynn document was blank; (3) it contained an anti-discrimination clause (couched in the language of Section 8(a)(3) of the Act), which the Flynn document did not; and (4) it provided for paid holidays, which the Flynn document did not; and (5) it provided that employees should be paid 50% of the established hourly customer charge while the Flynn document provided they should be paid 50% of the customer labor charge where such charge was based upon a flat rate to the customer (so-called 'discount work')" [R. 87-88].

The Court of Appeals also found:

> "Changes (3), (4) and (5) were made upon a statement by Randall, a state labor conciliator, to the Union that he had consulted with respondent concerning them and that they were acceptable to respondent.[3] ([3]–There is nothing in the Special Master's Report showing that Randall had any authority to make such a statement on respondent's behalf.)" [R. 88.]

Neither the Court of Appeals nor the Special Master found that the Petitioner agreed to the charges made in his proposal by the Union. The order of the court below requires Petitioner to sign the Union's proposed contract of August 15, 1952, despite the fact that, in accordance with the findings of fact of that Court, Petitioner has never agreed to some of the major provisions of this contract.

On September 19, 1952, in answer to an inquiry from a Board field examiner, Thomas B. Flynn stated that an unspecified contract between the Petitioner and the Union had been signed [R. 77, 92]. On November 7, 1952, Petitioner made a new contract proposal to the Union in which he made changes in his contract proposal of July 26, 1954 [R. 79-80, 89]. At the request of Petitioner a meeting was held with the Union on January 15, 1953. At this meeting the representatives of the Union refused to discuss the proposed contract or any opinions of it on the ground that an agreement had already been reached between Petitioner and the Union [R. 82, 89]. Whereupon Petitioner filed a refusal to bargain charge against the Union, which was dismissed by the General Counsel of the Board [R. 82-83, 89].

Specification of Error to Be Urged.

The court below erred in requiring Petitioner to sign a collective bargaining agreement which contains provisions to which Petitioner has never agreed.

Reasons for Granting the Writ.

1. The decision of the court below is in conflict with the decision of this Court in *National Labor Relations Board v. American National Insurance Company,* 343 U. S. 395, where this Court, speaking through Mr. Chief Justice Vinson, stated at page 404:

> "That Section (Section 8(d) of the National Labor Relations Act) contains the express provision that the obligation to bargain collectively does not compel either party to agree to a proposal or require the making of a concession. . . . it is . . . clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements."

Contrary to this decision of the Court, the court below in its order required the Petitioner to sign a contract proposed by the Union which contains major provisions to which the Petitioner has not agreed and thus compels the Petitioner to make concessions to the Union.

2. The decision of the court below is in conflict with the decisions of at least three other courts of appeals. See *National Labor Relations Board v. Hart Cotton Mills,* 190 F. 2d 964 (C. A. 4); *Majure Transport Co. v. National Labor Relations Board,* 198 F. 2d 735 (C. A. 5); *National Labor Relations Board v. Dealers Engine Rebuilders, Inc.,* 199 F. 2d 249 (C. A. 8). In each of these

cases the courts held the employer was not required by the National Labor Relations Act, as amended, to accept the proposal of the union or to make any concessions.

3. The question presented here is of fundamental importance to the administration of the Labor-Management Relations Act of 1947. It is imperative that employers and labor organizations know, in their dealings with one another, whether collective bargaining agreements are to be reached by negotiation or whether these agreements are to be dictated by the courts or the Board. Neither of these parties can be certain of their rights and obligations in bargaining collectively unless the conflict of decisions on this question is resolved.

Conclusion.

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

FREDERICK A. POTRUCH,
ERWIN LERTEN,
H. BURDETTE FREDRICKS,
Counsel for Petitioner.

May 25, 1954.

APPENDIX.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151 *et seq.*), are as follows:

Unfair Labor Practices.

Sec. 8. (a) It shall be an unfair labor practice for an employer—

* * * * * * * * *

(5) to refuse to bargain collectively with representatives of his employees, subject to the provisions of section 9(a).

* * * * * * * * *

(d) for the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession:

* * * * * * * * *

Prevention of Unfair Labor Practices.

Section 10. * * *

* * * * * * * * *

(e) The Board shall have the power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of

Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. * * * The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon a writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).